**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 432 OF 2004**

Rajaram Narayan Magdum
(since decease through heirs) ...Appellants

vs.

Prakash Tryambak Gore ...Responent

Mr.M.R.Suryavanshi for the Appellants
Mr.P.D.Dalvi for the Respondent

**CORAM: A.S.OKA,J.**
**DATE : MARCH 9,2005.**

**P.C.:**

1. Heard Counsel appearing for the parties. The Appeal is by the original Plaintiffs who filed a suit for removal of encroachment. The Trial Court decreed the suit. The Appellate Court has set aside the decree on two grounds. The first ground is that the original Appellant has failed to establish his title to the suit property and secondly on the ground that the encroachment is not established.

2. Shri Suryawanshi for the Appellants submitted that at the instance of the Respondent-defendant, an Advocate came to be appointed as Court Commissioner whose report is not disputed. He submitted that if the said report is read it is apparent that the Respondent has made an encroachment. He submitted that Civil Application No.1287 of 2004 has been filed by the Appellants in this Appeal for appointing T.I.L.R. as Court

Commissioner. He submitted that the Appellants cannot be made to suffer only on the ground that the Application was not made either in the Trial Court or in the Appellate Court for appointment of T.I.L.R. as Court Commissioner.

3. Shri Dalvi for the Respondent submitted that power under Order XXVI Rule 9 of Code of Civil Procedure, 1908 cannot be exercised in the Second Appeal.

4. The Trial Court has noted that there is a dispute between the parties as regards measurements taken by the Court Commissioner. It is an admitted position that the Respondent has purchased certain property by sale deed of the year 1936 from the Predecessor of the Appellant-Plaintiff. The dispute between the parties is obviously boundary dispute and it was for the Appellant to apply for appointing competent Survey Officer as a Court Commissioner. However, this was not done by the Appellants.

5. At this stage, the Appellant cannot be allowed to apply for appointment of Court Commissioner. In my view, the application made by the Appellant in this Appeal is belated and the same will have to be rejected only on that ground.

6. The Appellate Court has also recorded a finding of fact that all that the Appellant has established is ownership in respect of Gram Panchyat House Nos.147,148 and 149. It is

rightly held by the Appellate Court that on the basis of the record of the Gram Panchayat, inference cannot be drawn that the Appellants have established their title in respect of the property shown in the map annexed to the plaint.

7. The findings of fact recorded by the Appellate Court are based on the legal evidence on record. Merely because another view is possible to be taken on the basis of evidence on record is no ground to interfere in the Second Appeal under Section 100 of Code of Civil Procedure, 1908. Second Appeal is dismissed with no order as to costs.

**JUDGE.**